Supreme Court, U.S.
FILED
OCT 20 1998
CLERK

No. 98-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, *et al.*,

Appellants,

v.

MATTHEW GLAVIN, *et al.*,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

Of Counsel:
THOMAS M. RIORDAN
KAREN M. WAHLE
ALFREDO BARRIOS
DERRICK F. COLEMAN
ANDREA J. WORDEN
JESS B. FROST
DAVID E. LEDERMAN
O'MELVENY & MYERS LLP

JAMES K. HAHN
City Attorney
JESSICA F. HEINZ
Assistant City Attorney
CITY OF LOS ANGELES

BRIAN S. CURREY
Counsel of Record
C. DOUGLAS KRANWINKLE
RICHARD M. JONES
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

Counsel for Appellees City of Los Angeles, et al.

[Additional counsel listed following signature page.]

BEST AVAILABLE COPY

21 pp

QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. §§ 1, *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in determining the population for the purpose of apportioning Representatives among the States.

2. Whether the Secretary of Commerce's plan for the 2000 census violates either Article I, Section 2 of the Constitution, or Section 2 of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING BELOW

1. APPELLANTS (defendants in the District Court):

   William S. Clinton, in his capacity as President of the United States; The United States Department of Commerce; William M. Daley in his capacity as Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, in his capacity as Acting Director of the Bureau of the Census.

2. APPELLEES (plaintiffs in the District Court):

   Matthew Glavin; Robert Barr, individually and in his capacity as a member of the United States House of Representatives; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresantata; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn, individually and in his official capacity as Cobb County Commission Chairman; and Cobb County, Georgia. Plaintiffs twice moved to amend their complaint to add the following additional plaintiffs: Delaware County, Pennsylvania; DuPage County; Illinois; and Bucks County, Pennsylvania. It is not clear whether the district court granted the motions to amend.

3. APPELLEES (intervenor-defendants in the District Court):

City of Los Angeles, *et al.*: City of Los Angeles, CA; State of New Mexico; State of Texas; City of New York, NY; County of Los Angeles, CA; City of Chicago, IL; City and County of San Francisco, CA; County of Miami-Dade, FL; City of Inglewood, CA; City of Houston, TX; City of San Antonio, TX; City and County of Denver, CO; City of Long Beach, CA; City of San Jose, CA; City of Stamford, CT; City of Oakland, CA; City of Cudahy, CA; County of Santa Clara, CA; County of San Bernardino, CA; County of Alameda, CA; County of Riverside, CA; City of Detroit, MI; City of Bell, CA; City of Gardena, CA; City of Huntington Park, CA; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and the following Members of Congress, individually and in their official capacities as Members of the United States House of Representatives: Carolyn Maloney; Christopher Shays; Tom Sawyer; Rod Blagojevich; Bobby Rush; Luis Gutierrez; John Conyers, Jr.; Jose Serrano; Cynthia McKinney; Charles Rangel; Donald Payne; Howard Berman; Xavier Beccera; Loretta Sanchez; Julian Dixon; Henry Waxman; Maxine Waters; Esteban Torres; Sheila Jackson Lee; Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez; Carlos Romero-Barcelo.[1]

---

[1] The district court issued an Order on October 15, 1998 (see Appendix) clarifying that it had granted all motions to intervene on August 7, 1998, including that of the City of Los Angeles, *et al.* appellees. If, for any reason, the City of Los Angeles, *et al.* appellees are not considered parties to this action,

In compliance with Rule 29.6, none of the City of Los Angeles, *et al.* appellees are parent corporations, subsidiaries or affiliates of any entities that have outstanding securities in the hands of the public.

4. APPELLEES (intervenor-defendants in the District Court):

Richard A. Gephardt, *et al.*: Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M. Slaughter; Bennie G. Thompson, individually and in their official capacities as Members of the United States House of Representatives.

5. APPELLEES (intervenor-defendants in the District Court):

Legislature of the State of California, *et al.*: Legislature of the State of California; the California Senate; John Charles Burton, individually and as President Pro Tempore of the California Senate; the California Assembly; and Antonio Villaraigosa, individually and as Speaker of the California Assembly.

6. APPELLEES (intervenor-defendants in the District Court):

National Korean American Service & Education Consortium, Inc., *et al.*: National Korean

---

they hereby request that the Court accept this submission as an *amicus* brief.

American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim; Michael Balaoing; Sovann Tith; Johnny M. Rodriguez; Chayo Zaldivar; Gilberto Flores; Alvin Parra.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

Section 2 of The Fourteenth Amendment Does Not Prohibit The Use of Statistical Sampling For The Purpose of Apportionment 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

U.S. Constitution

amend. XIV, § 2 . . . . . 5, 6

art. I, § 2, cl. 3 4

Miscellaneous

The United States Department of Commerce, Bureau of Census, Report to Congress -- The Plan for Census 2000 2

William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (1998) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No. 98-564

WILLIAM JEFFERSON CLINTON, *ET AL.*,
Appellants,

v.

MATTHEW GLAVIN, *ET AL.*,
Appellees.

On Appeal from the United States
District Court for the Eastern District of Virginia

BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

STATEMENT OF THE CASE

An inaccurate census is a boon to the plaintiff-appellees. For the last eight years, they have enjoyed the windfall produced by flawed 1990 census data: enhanced voting power and a more than fair share of federal funds. The plaintiff-appellees received this windfall because they reside in areas immune to the invidious problem of differential undercounting, namely, the predominately white, affluent, suburban regions of our country. And like all unjust enrichment, this windfall comes at the expense of others -- minorities, immigrants, children and the rural poor, the

people least able to afford vote dilution or the diminution of federal assistance.

Conversely, an accurate census will cause grave "injury" to the plaintiff-appellees, or so they contend. Because statistical sampling would reduce or eliminate differential undercounting, the plaintiff-appellees would no longer receive an inequitable share of federal funds or greater representational value for each vote cast. In other words, their "injury" flows from being deprived of their windfall, and they are unwilling to relinquish those advantages. Such an incredible claim stands the notions of justice and redressable injury on their heads, and should not be countenanced by this Court.

The Census Bureau's plan for conducting the 2000 census, which includes the use of statistical sampling in conjunction with traditional data collection techniques, will result in the most accurate and cost-effective census ever taken. *See The United States Department of Commerce, Bureau of Census, Report to Congress -- The Plan for Census 2000*, ix (revised and reissued August 1997). Reapportionment and redistricting based on census data adjusted using statistical sampling would more closely approach the constitutional objective of one-person, one-vote. And census data adjusted by statistical sampling also would facilitate a more even-handed distribution of federal funds to local government entities. Neither the Census Act nor the Constitution precludes the use of statistical sampling for the purpose of Congressional reapportionment, and Section 195 of the Census Act actually requires its use for all other purposes -- such as redistricting and allocation of

federal funds -- where, as here, the Secretary of Commerce deems it feasible.

The plaintiff-appellees essentially claim an entitlement to the advantages they have enjoyed in terms of political power and federal funding. They, like all Americans, however, are only entitled to equal representation and an equitable distribution of federal funds, both of which depend upon accurate census data.

SUMMARY OF ARGUMENT

This case has been consolidated for oral argument with the *United States Department of Commerce, et al. v. United States House of Representatives, et al.*, No. 98-404. On the merits, the legal issues raised by the two cases are virtually identical. These issues were addressed in the *Brief of Appellees City of Los Angeles, et al. in Support of Appellants*, filed in No. 98-404 on October 6, 1998, and need not be repeated here. The lone exception is plaintiff-appellees' contention below that the phrase "counting the whole number" in Section 2 of the Fourteenth Amendment requires census takers to engage in a "head count," and prohibits the use of statistical sampling. That contention is nonsense. The quoted passage refers to a rule of apportionment, not a mode of gathering census data.

ARGUMENT

Section 2 of The Fourteenth Amendment Does Not Prohibit The Use of Statistical Sampling For The Purpose of Apportionment

In the district court, the plaintiff-appellees argued that the phrase "counting the whole number of persons" in Section 2 of the Fourteenth Amendment constitutes a "constitutional mandate that population be determined by means of an actual head count." *Plaintiffs' Reply Brief in Support of their Motion for Summary Judgment* at 27. The district court did not reach this -- or any other -- constitutional issue. And, in any event, plaintiff-appellees' argument has no support in either the text or the drafting history of the Fourteenth Amendment.

Ratification of the Thirteenth Amendment abolished the ignominious "three-fifths rule" embodied in article I, Section 2 of the Constitution:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons*.

U.S. Const., art. I, § 2, cl. 3 (emphasis added).

Because they were no longer slaves, the freedmen moved from the category "all other Persons" to the "whole Number of free Persons." However, because the Thirteenth Amendment had not guaranteed freedmen the vote, the ironic

result was to increase the political power of white Southerners. *See* William E. Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine*, 40-43 (1998).

The purpose of Section 2 of the Fourteenth Amendment was to adjust the rule of apportionment. The first part of Section 2 reflects the emancipation of the slaves, and the elimination of the three-fifths rule, by providing that:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.

U.S. Const., amend. XIV, § 2.

And, as reflected in the balance of Section 2, the framers of the Fourteenth Amendment selected a rule of apportionment that would reduce Southern representation in Congress to the extent the freedmen were systematically denied the right to vote:

> But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id.

The phrase "counting the whole number of persons" simply means that every inhabitant (with the exception of "Indians not taxed"), including the former slaves, shall be counted as a whole person -- not three-fifths of a person -- for the purpose of apportionment.

Plaintiffs' contention that the phrase demonstrates that the framers of the Fourteenth Amendment were exclusively committed to conducting the census through the use of a "head count" is wholly unsupported by the records of the debates of the first session of the Thirty-Ninth Congress that drafted and debated the Fourteenth Amendment. As was also true with the debates among the framers of the Census Clause in 1787, these debates were concerned solely with the substantive rule of apportionment, not the mode of gathering census data.

CONCLUSION

For all the reasons stated above, the Court should reverse.

Respectfully submitted,

Dated: October 20, 1998

Of Counsel:

THOMAS M. RIORDAN
KAREN M. WAHLE
ALFREDO BARRIOS
DERRICK F. COLEMAN
ANDREA J. WORDEN
JESS B. FROST
DAVID E. LEDERMAN
O'MELVENY & MYERS LLP

Counsel for Appellees
City of Los Angeles, et. al.

BRIAN S. CURREY
Counsel of Record
C. DOUGLAS KRANWINKLE
RICHARD M. JONES
O'MELVENY & MYERS LLP
400 South Hope Street
Los Angeles, CA 90071
(213) 430-6000

Counsel for Appellees
City of Los Angeles, et al.

JAMES K. HAHN
City Attorney
JESSICA F. HEINZ
Assistant City Attorney
Office of the City Attorney
200 North Main Street
Los Angeles, CA 90012
(213) 485-5408

Counsel for Appellee
City of Los Angeles, California

DAN TORREZ
Assistant Attorney General
209 W. 14th Street
Austin, TX 78701
(512) 475-4410

Counsel for Appellee State of Texas

MICHAEL D. HESS
Corporation Counsel
LORNA B. GOODMAN
DAVID B. GOLDIN
Assistant Corporation Counsels
100 Church Street, Room 3-165
New York, NY 10007
(212) 788-1008

Counsel for Appellee City of New York, New York

LLOYD W. PELLMAN
County Counsel
MARY F. WAWRO
Senior Assistant County Counsel
DONOVAN M. MAIN
Assistant County Counsel
MANUEL A. VALENZUELA
Principal Deputy County Counsel
500 West Temple Street
Los Angeles, CA 90012
(213) 974-1807

Counsel for Appellee County of Los Angeles, California

BRIAN L. CROWE
Corporation Counsel
JULIA E. GETZELS
Director of Programs and Policy
ANDREW S. MINE
Assistant Corporation Counsel
Affirmative Litigation Division
30 North LaSalle Street
Chicago, IL 60602
(312) 744-6737/7220

Counsel for Appellee City of Chicago, Illinois

LOUISE H. RENNE
City Attorney
JENNIFER H. SMALL
Special Assistant for
Government Litigation
BUCK E. DELVENTHAL
Deputy City Attorney
MARIO KASHOU
Deputy City Attorney
1390 Market Street, 5th Floor
San Francisco, CA 94102
(415) 554-4283

Counsel for Appellee City and County of San Francisco, California

ROBERT A. GINSBURG
County Attorney
Stephen P. Clark Center
111 N.W. 1 Street, Suite 2810
Miami, FL 33128-1993
(305) 375-5151

Counsel for Appellee County of Dade, Florida

JACK BALLAS
Acting City Attorney
EMMERLINE FOOTE
Assistant City Attorney
One Manchester Blvd.
Inglewood, CA 90301-1750
(310) 412-5372

Counsel for Appellee City of Inglewood, California

ANTHONY W. HALL, JR.
City Attorney
SUSAN T. TAYLOR
Senior First Assistant City Attorney
HELEN M. GROS
Senior Assistant City Attorney
P.O. Box 1562
Houston, TX 77251-1562
(713) 247-2000

Counsel for Appellee City of Houston, Texas

FRANK J. GARZA
City Attorney
P.O. Box 839966
San Antonio, TX 78283-3966
(210) 207-8940

Counsel for Appellee City of San Antonio, Texas

DANIEL E. MUSE
City Attorney
STAN SHAROFF
Assistant City Attorney
Office of City Attorney
1445 Cleveland Place
Denver, CO 80202
(303) 640-2302

Counsel for Appellee City of Denver, Colorado

JOHN R. CALHOUN
City Attorney
HEATHER A. MAHOOD
Principal Deputy
City Hall
333 West Ocean Blvd. 11th Fl.
Long Beach, CA 90802
(562) 570-2200

Counsel for Appellee City of Long Beach, California

JOAN GALLO
City Attorney
GEORGE RIOS
Assistant City Attorney
151 West Mission Street
San Jose, CA 95110

Counsel for Appellee City of San Jose, California

THOMAS CASSONE
Director of Legal Affairs
Corporation Counsel's Office
888 Washington Boulevard
Stamford, CT 06901
(203) 977-4087

Counsel for Appellee City of Stamford, Connecticut

JAYNE W. WILLIAMS
City Attorney
PATRICK TANG
Deputy City Attorney
1 City Hall Plaza, 6th Floor
Oakland, CA 94612
(510) 238-6523

Counsel for Appellee City of Oakland, California

ANN M. RAVEL
Acting County Counsel
SUSAN B. SWAIN
Deputy County Counsel
County Counsel's Office
70 West Hedding, East Wing
San Jose, CA 95110
(408) 299-2111

Counsel for Appellee County of Santa Clara, California

ALAN K. MARKS
County Counsel
385 N. Arrowhead, 4th Floor
San Bernardino, CA 92415-0140
(909) 387-5455

Counsel for Appellee County of San Bernardino, California

DOUGLAS H. HICKLING
County Counsel
1221 Oak Street, Room 463
Oakland, CA 94612
(510) 272-6705

Counsel for Appellee County of Alameda, California

WILLIAM C. KATZENSTEIN
County Counsel
LEE A. VINOCOUR
Deputy County Counsel
Office of the County Counsel
3535 Tenth Street, Suite 300
Riverside, CA 92501-3674
(909) 955-6300

Counsel for Appellee County of Riverside, California

TOM UDALL
Attorney General
CHRISTOPHER D. COPPIN
Assistant Attorney General
6301 Indian School Rd. NE
Albuquerque, NM 87110
(505) 841-8086

Counsel for Appellee State of New Mexico

TERRI L. RENSHAW
Deputy Corporation Counsel
660 Woodward
1650 First National Building
Detroit, MI 48226-3535
(313) 237-3059

Counsel for Appellee City of Detroit, Michigan

ED LEE
City Attorney
281 South Figueroa Street
Los Angeles, CA 90012
(310) 217-9505

Counsel for Appellee City of Bell, California

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

MATTHEW GLAVIN, et al.,
Plaintiffs,

Civil Action No. 98-207-A

v.

WILLIAM J. CLINTON, et al.,
Defendants.

ORDER

This motion comes before the Court on the Intervenors' motions to clarify the Order for the motions to intervene. It appears to the Court that the motions to intervene were granted at the time of the hearing on August 7, 1998, and all intervenors were given the opportunity to be heard. Whereas the Intervenors have moved for further clarification, it is hereby

ORDERED that all Interveners motions to intervene are GRANTED.

Judges Widener and Jackson concur.

/s/
CHIEF JUDGE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 15, 1998